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345746—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 175

ANTOINETTE D. ANDREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 176

BERTHA A. RAINEY AND AQUILA W. SWEENEY, AS EXECUTORS OF CHARLOTTE L. ANDREWS, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 177

BERTHA A. RAINEY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 178

MARY A. STODDARD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 179

BELLE ANDREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 203–212) is reported at 135 F. 2d 314. The findings of fact and opinion of the United States Board of Tax Appeals (R. 155–167) are reported at 46 B. T. A. 607.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 20, 1943 (R. 216–220). The petition for a writ of certiorari was filed July 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether scrip issued in payment of interest due on corporate obligations constituted income to the extent of its fair market value when received.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) General definition.—"Gross income"

includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

STATEMENT

The facts found by the Board of Tax Appeals may be summarized as follows:

The taxpayers kept their books and made their income tax returns for 1936 on the cash basis. Throughout that year they were owners of Associated Gas & Electric Company "6% Convertible Obligations" in varying amounts which matured on March 1, 2002. (R 139–147, 155.) The obligations, by their terms, provided for the payment of interest in securities of the Associated Gas & Electric Company; they also provided that all interest paid in securities should be deemed paid to the extent of the amount or value of such securities as determined by the board of directors (R. 118–124, 157).

On September 22, October 20 and November 6, 1936, Associated Gas & Electric Company, by resolution, issued scrip to the holders of the convertible obligations in payment of past due interest. Each

issue was identical except for the date of issue and maturity. (R. 156.)

The dates of maturity were in October, November, and December, 1941, and the scrip bore interest, payable semiannually, at the rate of four percent per annum, whenever the board of directors should declare available net income for the purpose. The interest was cumulative.[1] The scrip was payable as to principal and accumulated interest at maturity without regard to available net income. R. 156–157, 162.)

The principal of the scrip and accumulated interest were subordinated in payment to senior securities of the company. The indebtedness, though large, could not be accurately determined in 1936, nor could estimates be fairly made as to what that indebtedness would be in 1941, when the scrip certificates became due, because of the contingent nature of certain of the company's liabilities. Although the company was in serious financial difficulties in 1936, and although the reports of the company and of its subsidiaries for 1934 showed a deficit, those for 1935 and 1936 showed increasing profits for the system and indicated a trend which, if continued, would restore the sound position of both the company and the system. In 1936 there existed a substantial equity for the stockholders, as

[1] The six percent convertible obligations provided that unpaid interest thereon should accumulate without interest (R. 157).

shown by the report of the company for that year (R. 157–158).

The scrip was never traded in or quoted on any exchange. All transactions during the year 1936 were over the counter. On the basis of such sales and other evidence in the record, the Board of Tax Appeals found as a fact that the scrip received by these taxpayers had a fair market value of 35 cents for every dollar of face value (R. 158, 159). Deficiencies were determined against each taxpayer on this basis (R. 175–176).

The court below held (1) that the taxpayers received income in 1936 to the extent of the value of the scrip at that time, but (2) that the evidence did not support the Board's finding that the scrip was worth 35 cents on every dollar of face value thereof. The case was accordingly remanded to the Board (now The Tax Court of the United States) to make a new finding as to the value of the scrip when received (R. 203–211).

ARGUMENT

There is no basis for granting certiorari in these cases. The scrip issued by the Associated Gas & Electric Company to these taxpayers was issued in payment of past due interest on its six percent convertible obligations. It represented a separate, transferable, and different property interest. It was not the mere recognition of an existing liability. Unquestionably it represented income to

these taxpayers to the extent of its value when received. G. C. M. 14182, XIV–1 Cum. Bull. 152.

There is no conflict of decisions as alleged by the taxpayers (Br. 8–23). The cases cited, to the extent that they may be at all relevant, deal with various elements which the courts have deemed important in determining value. The question of the correct value of the scrip at the time of receipt remains to be determined by the Tax Court pursuant to the remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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